MOTION FILED
JUN 10 1996

No. 95-1980

In the

Supreme Court of the United States

October Term, 1995

DAVID RIVKIN, EDWARD RIVKIN,
JUDITH RIVKIN, t/a GALAXY MANOR,
A New Jersey Partnership,
Petitioners,

v.

DOVER TOWNSHIP RENT LEVELING BOARD,
Respondent.

Petition for Writ of Certiorari
to the New Jersey Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petition for writ of certiorari filed by David Rivkin, *et al.* Consent to the filing of this brief has been granted by counsel for petitioners and has been lodged with the Clerk of this Court. Respondent, Dover Township Rent Leveling Board, has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 20,000 contributors and supporters located throughout the Nation and maintains its principal office in Sacramento, California. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees, through its legal review committee, has authorized the filing of an amicus curiae brief in this matter.

Attorneys for PLF have participated in numerous cases concerning constitutional protections for property rights before this Court and other courts representing both amicus curiae and property owners. Many of these cases involved the Due Process Clause, including *Lockary v. Kayfetz*, 908 F.2d 543 (9th Cir. 1990), in which PLF attorneys were counsel of record, and *Pennell v. City of San Jose*, 485 U.S. 1 (1988), in which PLF participated as amicus curiae. PLF also participated as amicus curiae before this Court in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992).[1]

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[1] PLF has also participated in virtually every major case before this Court in the last two decades involving land use and the Takings Clause. For example, PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF has participated as amicus curiae in cases from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304 (1994).

PLF also has a Rent Control Project which is actively litigating procedural and substantive infirmities, of constitutional dimensions, in the administration of local rent control laws by four California cities. Attorneys in PLF's Rent Control Project are counsel of record in *Santa Monica Beach, Ltd. v. Superior Court*, 42 Cal. App. 4th 1228 (1996), *review granted* by California Supreme Court. PLF also participated as amicus curiae before this Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Specifically, PLF will demonstrate that the court in this case departed from the commonly accepted requirement, in conflict with a number of federal appellate courts, that administrative adjudications affecting private property rights be justified by an articulated and legitimate rationale. PLF will also show that the court's holding is inconsistent with the precedents of this Court when the New Jersey court ruled that postdeprivation remedies can

insulate government agencies from constitutional liability for a procedurally deficient hearing that deprived citizens of their property rights.

DATED: July ___, 1996.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

When petitioners David, Edward, and Judith Rivkin, in partnership as Galaxy Manor (Rivkins), submitted an application for a rent increase to respondent Dover Township Rent Leveling Board (Rent Board) in May, 1990, they

expected a simple, noncontroversial process. They had records demonstrating expenses of $59,624.96; the Rivkins believed these were for capital improvements that could be recovered through an increase in the rents paid by the tenants of their mobile home park, under the local mobile home rent control ordinance. The job of the five members of the Rent Board was clear: to review the application and determine how many of the expenses fit in the category of major capital improvements.

But over the course of four public hearings--in June, July, August, and October, 1990--the Rivkins found that instead of being composed of five neutral arbiters of their claims, the Rent Board contained one member who viewed his role as "one of advocacy rather than adjudication." *Rivkin v. Dover Township Rent Leveling Board*, 143 N.J. 352, 358 (1996); Appendix (App.) A to Petition for Writ of Certiorari (Pet.) at 4a. The Rent Board is comprised of three members from the general public, one mobile home park owner, and one mobile home park tenant. The tenant member, one Mr. Baltarzuk--who happened to reside at the very park for which the rent increase was sought--"stated on the record that it was his function to 'serve the people of the mobile home park.'" *Rivkin*, 143 N.J. at 358-59, App. A to Pet. at 4a. The tenant member's "manner was threatening to the Rivkins," and he berated their attorney, introduced evidence that was outside the record, and "in essence, offered himself as a witness concerning certain items." *Id.* at 359, App. A to Pet. at 4a-5a. The Rivkins' pleas to the Rent Board that this partisan member be disqualified from judging their case fell on deaf ears.

After the Rent Board voted to allow a rent increase to offset only $20,641.42 of the expenses, the Rivkins challenged the Rent Board's decision by filing a lawsuit in the New Jersey trial court. The lawsuit contained both a cause of action under New Jersey law to review local agency decisions--called an action in lieu of prerogative writs--and

a federal law cause of action under 42 U.S.C. § 1983, alleging violations of the constitutional guarantees of due process and equal protection.[2] The trial court found that "Baltarzuk's misconduct and manifest bias had tainted the proceedings," *Rivkin*, 143 N.J. at 360, App. A to Pet. at 6a, and the matter was remanded back to the Rent Board for a rehearing without the biased member. This time, the Rent Board approved a rent increase of $45,731.09, more than doubling its previous determination of major capital improvements and giving the Rivkins more than 75% of their request.

The Rivkins then returned to trial court, which found that the Rent Board had violated the Rivkins' due process rights, supporting an award of $6,303.34 in compensatory damages and $39,679.55 in attorneys' fees under 42 U.S.C. § 1983 and § 1988. App. C to Pet. at 54a. The trial court found that the biased member's "actions permeated the board, that the board allowed his actions and comments to affect their judgment in the case and therefore the board was recalcitrant with respect to this matter." App. D to Pet. at 58a. The trial court concluded that the bias of the tenant member "permeated the whole decision of the board," which should not have allowed him to participate in the proceedings. *Id.*

The Rent Board appealed this decision to the Superior Court of New Jersey for the Appellate Division, which reversed the judgment on the ground that the biased Rent Board member's actions were "random and unauthorized" and that the state law "action in lieu of prerogative writs" was an adequate post-deprivation remedy providing all the process the Rivkins were due. App. B to Pet. at 51a.

The New Jersey Supreme Court granted the Rivkins' petition for certification and affirmed the appellate court in

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[2] This brief addresses only the due process issues presented in this case.

an opinion issued February 29, 1996. The New Jersey Supreme Court considered the alleged due process violations under separate substantive and procedural due process analyses. Under the former, the court rejected the "arbitrary and irrational" standard for violations used by several Circuits in favor of the "shocks the conscience" standard. The court prejudged the case, stating prior to its analysis that, "we believe that the denial of a property right in the context of municipal governance rarely will rise to the level of a substantive due process violation," *Rivkin*, 143 N.J. at 366, App. A to Pet. at 13a.

Taking out of context this Court's standards for evaluating alleged infringements on liberty by law enforcement personnel enforcing criminal laws, and inappropriately focusing just on the conduct of the biased member, the New Jersey Supreme Court found no substantive due process violation. *Id.* at 366, App. A to Pet. at 14a. It rationalized that the biased Rent Board member "appears to have mistakenly believed that it was his duty to serve as a tenants' advocate. From this mistaken premise, Baltarzuk's actions were rational." *Id.* at 370, App. A to Pet. at 19a. The court closed its substantive due process analysis by baldly announcing:

> Until [United States Supreme Court] clarification, ... we seriously doubt that the Supreme Court will find a substantive due process violation to exist when a governmental body denies a property right by conduct that is "arbitrary or irrational" under state law but neither shocking to the conscience of a court in a sense of being a departure from civilized norms of governance, nor offensive to human dignity.

Rivkin, 143 N.J. at 371, App. A to Pet. at 20a.

Turning to the issue of procedural due process, New Jersey's highest court held that a fair predeprivation hearing was not required, since the biased member's actions were random and unpredictable, and thus the availability of the post-deprivation remedy successfully used by the Rivkins to reverse the Rent Board's decision provided all the due process they deserved. This incredible conclusion was reached even though it was an actual hearing which deprived the Rivkins of their property rights, at which these "unanticipated" actions were trumpeted before the entire Rent Board--who condoned the bias by refusing to disqualify Baltarzuk. The court denied the significance of the actions of the entire Rent Board, and even downplayed the impact of the biased member's advocacy role: "Perhaps Baltarzuk's disqualification should have come at an earlier stage." 143 N.J. at 384, App. A to Pet at 36a. *Perhaps* a biased judge should not have participated in the deliberations and determination of the Rivkins' property rights?

The Rivkins were injured twice. First, the Rent Board improperly denied the bulk of their rent increase request, following the lead of an admittedly biased and self-interested board member. Then, the New Jersey Supreme Court told them that property deprivations do not sufficiently trouble (or shock) its collective conscience so as to implicate due process, and that a hearing that deprived the Rivkins of property is a random, unanticipated act that does not violate due process standards as long as some postdeprivation remedy is available. The Rivkins responded by filing a petition for writ of certiorari, which amicus curiae supports with the present brief.

SUMMARY OF ARGUMENT

The "shocks the conscience" standard, adopted by the New Jersey Supreme Court for evaluating claims of property

deprivation without due process, should never have been lifted from its context of evaluating acts of force or physical restraint by government officials empowered to use such methods. The use of this standard creates a conflict with several Circuit Courts of Appeals which evaluate property regulations to insure that they are not arbitrary, capricious, or irrational. Under the latter standard, a procedural requirement that administrative boards provide a legitimate, articulated reason for their decisions to restrict property rights would facilitate court review. In the absence of such a requirement, the procedural rights to a hearing at which an applicant has the opportunity to be heard and to submit evidence are rather hollow rights.

When a government agency deprives citizens of property rights through a public hearing, this action cannot be excused due to the availability of postdeprivation remedies. This Court's *Parratt* doctrine was designed for circumstances in which a predeprivation hearing is impracticable, and has no application in circumstances when such a hearing has in fact taken place. The participation of a biased, partisan decision maker in such a proceeding violates due process and can be remedied through a civil rights suit under 42 U.S.C. § 1983.

ARGUMENT

I

THIS COURT SHOULD RESOLVE THE CONFLICTS OVER WHETHER THE DUE PROCESS CLAUSE PROTECTS PROPERTY OWNERS FROM ARBITRARY AND CAPRICIOUS GOVERNMENT RESTRICTIONS OF THEIR PROPERTY RIGHTS

The New Jersey Supreme Court has announced that deliberate, arbitrary decisions by government bodies to restrict property rights do not violate the due process guarantee of the Fourteenth Amendment. That Court bases this decision on *Rochin v. People of California*, 342 U.S. 165, 172-74 (1952). *See Rivkin*, 143 N.J. at 371, App. A to Pet. at 20a. New Jersey acknowledges that at least four Circuit Courts of Appeals have adopted a conflicting standard, *id.* at 368-69, App. A to Pet. at 17a-18a, but announces it will follow a "shocks the conscience" test until this Court says otherwise. Given the fundamental importance of the rights at stake, the Petition for Writ of Certiorari should be granted to settle these conflicts.

A. The "Shocks the Conscience" Test for Due Process Violations, Originating with the Rochin Opinion, Was Designed for the Context of Liberty Infringements in the Course of Crime Detection and Punishment and Is Inappropriate for Property Rights Violations

In the opinion below, the New Jersey Supreme Court joins the First Circuit Court of Appeals in importing the "shocks the conscience" standard into the due process analysis of property deprivations. *Rivkin*, 143 N.J. at 371, App. A to Pet. at 20a. New Jersey has gone even farther than the First Circuit, which at least recognized an alternative test: "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." *PFZ*

Properties, Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir. 1991) (internal quotation marks and citation omitted), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992).

The New Jersey court adopted a test that does not fit comfortably in the property rights context. In *Rochin*, this Court grappled with the question of whether certain actions by the police to obtain evidence of a crime concealed by a criminal suspect would violate due process. The police tried forcibly to remove the drug crime evidence from the suspect's mouth when he was swallowing it, and then took the suspect to the hospital so that his stomach would be pumped with liquid to induce vomiting and thereby disgorge the contraband. *Rochin*, 342 U.S. at 166.

The *Rochin* Court recognized that "the administration of criminal justice is predominately committed to the care of the States," *id.* at 168, and that there exists "the comprehensive right of States to fashion their own rules of evidence for criminal trials," *id.* at 173. Given this context, and the obvious fact that law enforcement entails the use of force by government employees in a necessarily improvisational manner, the Court was careful to circumscribe any vehicle, such as due process challenges, that interfered with this basic and inherently dangerous responsibility of the states.

The *Rochin* Court's solution was to hold that action by police on the streets restricting liberty would violate due process if it could be said that it was "conduct that shocks the conscience," as opposed to actions that merely "offend some fastidious squeamishness or private sentimentalism about fighting crime too energetically." *Rochin*, 342 U.S. at 172. The word "shocks" is employed because of the context: the messy business of crime-fighting. In *Rochin*, the Court found that the police officers used "methods too close to the rack and the screw to permit of constitutional differentiation," *id.*, a quote which the New Jersey Supreme

Court severs from its context and submits as the definition of "substantive due process violations" in general. *Rivkin*, 143 N.J. at 366, App. A to Pet. at 14a.

The "shocks the conscience" standard is at once elastic (depending upon the subjective feeling of judges) and exacting (in setting a high threshhold) and should be confined to the context of alleged liberty infringements by government employees whose position requires the use of some physical force or restraint. *See, e.g., Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir. 1991) (alleged rude and threatening conduct by police officers); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (corporal punishment by teacher); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (alleged violent actions by prison guard). When employed in the context of an alleged deprivation of property, the very language of this test becomes almost laughable. *See LRL Properties v. Portage Metro Housing Authority*, 55 F.3d 1097, 1111 (6th Cir. 1995) (denial of apartment owners' right to receive federal low-income housing subsidies does "not even approach the level of 'shocks the conscience'").

The "shocks the conscience" test is simply inappropriate when the acts to be evaluated are not acts of physical force or coercion. Judges *should* be troubled when government bodies act to interfere intentionally with the right of an individual to enjoy the use of his property. But visceral discomfort with the result of a government decision to limit property rights should not be the basis for due process determinations when a more objective standard is at hand.

B. Government Decisions That Restrict Property Rights Should be Scrutinized to Determine if the Actions Are Arbitrary, Capricious, or Irrational

Several circuits take an approach to due process protections of property rights that, upon reflection, is far less subjective than a test based on whether a panel of judges'

consciences are sufficiently shocked. These courts look to see if a government body's decision to restrict property rights was arbitrary, capricious, or irrational. *See, e.g., DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 601-02 (3rd Cir. 1995); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957-58 (9th Cir. 1991), *cert. granted, judgment vacated, and remanded*, ___ U.S. ___, 113 S. Ct. 31 (1992), *reversed on other grounds*, 987 F.2d 662 (9th Cir. 1993); *Marks v. City of Chesapeake, Virginia*, 883 F.2d 308, 309 (4th Cir. 1989); *Brady v. Town of Colchester*, 863 F.2d 205, 215-16 (2d Cir. 1988).

Arbitrary, capricious, or irrational decisions either lack a legitimate justification, have an illegitimate purpose, or cannot even be explained after the fact. It has long been considered the duty of our courts to scrutinize a decision-making process that restricts property rights to see if a legitimate purpose has been served. Due process embraces the fundamental concept that certain government decisions must relate to a legitimate end of government and may not be made for no reason or for a bad reason. *See Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894). This concept is the essential difference between the rule of law and arbitrary government, between a government of laws and one of men.

When a government agency conducts public hearings on an application and then makes a deliberate decision concerning property owners' use of their property, it is not too much to ask that the government supply a reason for its actions. If no reason is given, then that action is arbitrary. If the apparent reasons are impermissible, then that action is capricious. If the reason is nonsensical, then that action is irrational. If courts were to employ this approach, then due process review would be more objective and comprehensible.

The New Jersey Supreme Court in this case rejected the "arbitrary and irrational" test, because:

> In the land use context, the phrases "arbitrary and irrational" or "capricious" are often shorthand expressions for a standard of review that asks whether there are sufficient facts in the record to support the agency's action or whether the agency has followed its legislative mandate.

Rivkin, 143 N.J. at 369, App. A to Pet. at 18a (citation omitted). To the court below, a government agency does not violate due process when its actions are insupportable or ultra vires.

The New Jersey Supreme Court even appears to reject the rational basis test for property deprivations. It cited to opinions of the Eighth Circuit, which makes a distinction between the merely irrational and the "truly irrational"--the latter being the sort of decision to restrict property rights that could possibly violate due process. *Id.* at 370, App. A to Pet. at 19a; *see Chesterfield Development Corporation v. City of Chesterfield*, 963 F.2d 1102, 1104-05 (8th Cir. 1992). The Eighth Circuit is not alone in requiring something more than the irrational for a property restriction to violate the Constitution. *See, e.g., Hartland Sportsman's Club, Inc. v. Town of Delafield*, 35 F.3d 1198, 1202 (7th Cir. 1994); *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990).

The foregoing shows that even under an arbitrary and irrational test, there still remain questions as to how "irrational" conduct is to be defined for due process purposes. In the opinion below, the Court concluded that the actions of the biased individual "were rational" under his mistaken belief that his role was to abuse mobile home park owners. *Rivkin*, 143 N.J. at 370, App. A to Pet. at 19a. Other courts agree that it is rational for decision makers to carry water for their constituents. *See, e.g., Stubblefield*

Construction Co. v. City of San Bernardino, 32 Cal. App. 4th 687, 696 (1995); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995); *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988). Still others find such motivations impermissible. *Marks*, 883 F.2d at 309; *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988).

This Court should settle these conflicts and decide if due process requires that governments not act arbitrarily or maliciously when deciding to curtail the property rights of their citizens.

II

THIS COURT SHOULD CLARIFY WHETHER DUE PROCESS REQUIRES ADMINISTRATIVE DETERMINATIONS THAT RESTRICT PROPERTY RIGHTS TO BE BASED ON LEGITIMATE, ARTICULATED JUSTIFICATIONS

The *Rivkin* case presents this Court with the opportunity to address a most fundamental question concerning the meaning of the Due Process Clause for property owners navigating through the administrative process. As the foregoing demonstrates, circuits are at odds over whether arbitrary, capricious, or irrational regulation of property violates due process. But even if this Court settles the question by rejecting the "shocks the conscience" standard, a big question still remains: How will courts determine if a government decision is arbitrary, capricious or irrational? Will they look to the actual grounds for the decision, *see Brady*, 863 F.2d 215-16 (trier of fact to decide if permit decision was based on impermissible grounds) or instead supply their own rational basis by hypothesis, *see Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986) (holding "a zoning decision can be justified by hypothesized

purposes" but acknowledging that for "protected property interests" a "later procedural due process inquiry might require a zoning board to point to *a* rational basis").

As the New Jersey Supreme Court recognized, "[a]nalytically the Rivkins' case is much closer to a procedural due process claim," than a substantive due process claim. *Rivkin*, 143 N.J. at 371, App. A to Pet. at 20a. The reason that an arbitrary decision was reached by the Rent Board was that one of its members chose not to consider the evidence in a neutral manner but instead personally chose to be the "adversary" in an adversarial process. This Court should consider whether administrative determinations affecting property rights require a certain result that is *procedural* in nature--namely, an articulated, legitimate justification for the determination. This final step in the process facilitates review by the courts but does not entail the substitution of a court's judgment concerning policy matters for the judgment of a regulatory body. This final step is consistent with the traditional approach taken by this Court to the constitutional protection of property rights.

This Court has long recognized that a special, particular process is "due" when property rights are at stake. In *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 241 (1897), it was held that due process requires that property taken by the government for public purposes be acquired by payment of just compensation. The Court explained, "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." 166 U.S. at 236-37. Similarly, if government regulation effects a taking of property, the government must pay just compensation for the time period in which the property owner was subject to the unconstitutional action--"temporary takings" compensation.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 322 (1987).

The importance of the substantive outcome in cases involving property rights is not derived from the policy choices of judges, but from the choice made by the people of this nation in including protection of property rights in the Bill of Rights. "[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (citation omitted).[3]

Unlike the wide ranging and often controversial interests asserted in the context of alleged liberty deprivations, property rights are matters of settled common law and are most frequently restricted in the course of quasi-judicial, administrative processes. As this Court noted in *Daniels v. Williams*, "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." 474 U.S. 327, 331 (1986) (citation omitted; emphasis in original). The Due Process Clause "'"was intended to secure the individual from the arbitrary exercise of the powers of government."'" *Id.* (citation omitted). If government conducts a hearing in

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[3] Property rights receive heightened protection under the Takings Clause, as the regulation of the use and enjoyment of property must have more than a mere hypothetical connection with a legitimate end of government--it must *in actuality* "substantially advance" such an end. *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304, 316 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.3 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). However, that clause is no substitute for the Due Process Clause, under which payment of actual damages for government mistreatment can be obtained. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985); *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d at 464.

a deliberate manner that results in a restriction of property rights, then due process should require that the reasons behind the property rights restrictions be publicly articulated by the government body.

This procedural requirement serves two purposes. If a government body must verbalize its reasoning, "substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes*, 407 U.S. at 81 (discussing importance of notice and opportunity to be heard). Second, an official statement by the regulatory body will enable courts to determine if the grounds justifying a decision are within the jurisdiction of the government agency, or are instead an ultra vires action. When property regulators act through the administrative process to determine the property rights of individuals, it is not much of an imposition to require that "the decision maker should state the reasons for his determination and indicate the evidence he relied on." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (discussing state termination of welfare benefits).

In this particular case, if the Rent Board had been required to state the reasons for its decision and that statement revealed that the evidence and arguments proffered by Baltarzuk were the basis for the diminished rent increase, the violation of due process would be clear and obvious and would require no amount of hypothesizing by the courts. Given the fundamental importance of private property rights and the need to provide an anchor for judicial review of administrative decisions affecting these rights, this Court should grant the petition for writ of certiorari in order to establish that a statement of reasons is necessary as a bright line procedural requirement.

III

THIS COURT SHOULD DETERMINE WHETHER A PROCEDURALLY INADEQUATE HEARING IN WHICH A BIASED MEMBER PARTICIPATES VIOLATES DUE PROCESS OR IS INSTEAD SUBJECT TO THE PARRATT DOCTRINE

The New Jersey Supreme Court held that the Rent Board's decision to wrongfully deny the Rivkins' rent increase application, reached with the full participation of a biased member whose actions "permeated the whole decision," App. D to Pet. at 58a, was not a violation of the Rivkins' right to procedural due process. The court purported to be applying the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981), which held that a predeprivation hearing with all the trappings of due process is not required for property deprivations accomplished by "a random and unauthorized act by a state employee," since "[i]n such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur." *Id.* at 541. The New Jersey court has misapplied the *Parratt* doctrine in a manner which disserves the reasoning behind the doctrine.

A. Deliberate Decisions by a Government Body in the Course of a Public Hearing Are Not Random, Unauthorized Acts

The *Parratt* Court considered whether the negligent loss of a prisoner's mail-order hobby kit by prison mail room employees was a deprivation of the prisoner's property without due process of law.[4] Essentially, the issue was whether a state government had the duty to conduct a hearing, with

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[4] In *Daniels v. Williams*, 474 U.S. at 334-36, this Court overruled *Parratt* on the issue of whether negligent government acts could violate due process, finding in the negative.

notice and the opportunity to be heard, for a prisoner prior to misplacing his mail. Quite obviously, a hearing is impossible under such circumstances, as the act of negligence was "in almost all cases beyond the control of the State." *Parratt*, 451 U.S. at 541.

Three years later, this Court extended the *Parratt* doctrine to certain *intentional* deprivations, as "[t]he state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Significantly, this Court added: "Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent." *Id.*

The property deprivation in the *Rivkin* case was accomplished not by some maverick government official acting on his own without knowledge of his agency, but was committed by an entire administrative board during the course of four public hearings. The biased member of the Rent Board, who acted as an advocate against the interests of the applicant (and for his own interests, as a resident of the subject mobile home park), did not attempt to hide from the rest of the Rent Board his antagonistic position: "He stated on the record that it was his function to 'serve the people of the mobile home park.'" *Rivkin*, 143 N.J. at 358-59, App. A to Pet. at 4a.

The deprivation of property in these circumstances was not the result of a random act of a government employee occurring beyond the supervision of his department superiors, but was instead the result of an official action of the very agency in question. Had Baltarzuk taken the only copies of the Rivkins' application for a rent increase and destroyed them without knowledge of the rest of the Rent Board, then the *Parratt* doctrine would come into play and

the availability of postdeprivation remedies would be sufficient process. But when an entire Rent Board, acting in its official capacity and through a series of public hearings and deliberations, deprives citizens of property the mere availability of postdeprivation remedies is not enough.

The Rent Board was not faced with an unpredictable occurrence--the deprivation was in the course of hearings designed to determine whether or not a rent increase will be allowed. It certainly knew that the deprivation was taking place. It certainly knew that a biased member was poisoning the process, as he admitted his wrongful view of his role on the record at these hearings. If official hearings to consider a rent increase application is not an official government procedure, then it is hard to imagine what would qualify as one.

The point of the *Parratt* doctrine is that the government cannot be expected to convene a hearing prior to every isolated act of its employees that deprives citizens of their property. But if a hearing is practicable and the government agency does have one, that hearing must comport with due process.

B. Failure to Disqualify a Biased Member from an Administrative Decision Taints the Proceedings and Deprives Applicants of Their Right to Due Process

The *Rivkin* court held that the process provided the Rivkins by the Rent Board was not inadequate merely because an openly-biased member "behav[ed] as a tenant advocate and introduc[ed] evidence from outside the record," while participating in a decision to deny the Rivkins the bulk of the rent increase to which they were entitled. *Rivkin*, 143 N.J. at 377, App. A to Pet. at 28a. The Court achieved this result by its finding that Baltarzuk's actions were not *required* by the terms of the local rent control ordinance, and thus cannot be said to have resulted from the state procedures.

But the critical issue below was not whether due process is violated by having a Rent Board member come from the ranks of mobile home park tenants. The issue was whether the Rivkins were entitled to have their rent increase application considered by neutral, disinterested government officials. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. ... The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and *have its merits fairly judged.*" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (emphasis added). *See also Goldberg*, 397 U.S. at 271 ("of course, an impartial decision maker is essential").

This Court should grant the Petition for Writ of Certiorari to determine whether administrative boards can include biased, partisan, and self-interested members in the decision to restrict the property rights of applicants. The New Jersey Supreme Court took as given the established facts that Baltarzuk was biased against the Rivkins, introduced evidence from outside the record, and had such an impact on the board that his actions "permeated the whole decision." Does this amount to due process, or is it an affirmative injury to the Rivkins' constitutionally protected interests by their government?

CONCLUSION

An administrative board, after four public hearings, decided to deny the bulk of a rent increase application submitted by petitioners. This decision was reversed by a trial court, which found that the participation of a biased

member of the board--who introduced evidence from outside the record, argued with and berated petitioners' attorney, and proclaimed his role to be one of advocate rather than adjudicator--was determinative of the outcome, in violation of petitioners' due process rights. The trial court subsequently awarded damages and attorneys' fees under 42 U.S.C. §§ 1983, 1988.

After an appellate court threw out this award, the New Jersey Supreme Court affirmed the appellate decision. That court based its decision on the view that property rights violations cannot "shock the conscience" and that the actions of the board were random, unauthorized, and unpredictable. This decision employs the *Rochin* standard improperly and rejects the "arbitrary and capricious" standard for due process claims used by several federal appellate courts. Further, it inappropriately employed the Parratt doctrine--which excuses the absence of predeprivation hearings when such a hearing is impracticable--in a case in which there *actually was a predeprivation hearing*.

In order to settle the conflicts created by the *Rivkin* opinion and bring some clarity to an increasingly muddled area of the law, amicus respectfully requests that this Court grant the petition for writ of certiorari.

DATED: July, 1996.

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